Picus v. Wal-Mart Stores, Inc. et al Doc. 5

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MARGARET PICUS, an individual; on behalf of herself, and on behalf of all others similarly situated,

Plaintiffs,

v.

WAL-MART STORES, INC.; MENU FOODS INC.; DEL MONTE FOODS COMPANY; SUNSHINE MILLS, INC.; CHEMNUTRA, INC.; and DOES 1 through 100, inclusive,

Defendants.

CASE NO.: CV-S-00682-PMP-LRL

AMENDED NOTICE OF REMOVAL BY DEFENDANT WAL-MART, STORES, INC.

Defendant WAL-MART STORES, INC. ("WAL-MART"), through undersigned counsel, hereby amends its Notice of Removal of the above-captioned action from the Eighth Judicial District Court for Clark County, Nevada to the United States District Court for the District of Nevada pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, and respectfully files this Amended Notice of Removal ("Notice"). The reason for this Amended Notice is due to the fact that the pleadings from the action in the Eighth Judicial District Court were inadvertently omitted from the original Notice of Removal.

Dockets.Justia.com

INTRODUCTION

1. On April 30, 2007, Margaret Picus, on behalf of herself and on behalf of all others similarly situated (collectively "Plaintiff"), commenced this action in the Eighth Judicial District Court, Clark County Nevada, assigned Case No. A540315. A true and correct copy of the Summons and Complaint in Case No. A540315 is attached hereto as Exhibit A.

2. As more fully set forth below, this is a civil action over which this Court has original jurisdiction under 28 U.S.C. § 1332(d)(2), and this action is removable under 28 U.S.C. § 1441, because it is a civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action between citizens of different states. Therefore, pursuant to 28 U.S.C. § 1441(a), WAL-MART may remove this action to this Court.

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I. WAL-MART HAS SATISFIED THE PROCEDURAL REQUIREMENTS REMOVAL

3. On May 8, 2007, WAL-MART was served with a copy of Plaintiff's Complaint. Accordingly, this Notice of Removal is timely pursuant to 28 U.S.C. § 1446(b). Pursuant to 28 U.S.C. § 1446(a), copies of all process, pleadings, and orders served upon WAL-MART are attached as composite Exhibit A.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 89(c) because it is the "district and division embracing the place where such action is pending." See 28 U.S.C. § 1441(a).

5. No previous application has been made for the relief requested herein.

6. WAL-MART, in good faith, believes that the amount in controversy exceeds $5,000,000, exclusive of costs and interest, diversity of citizenship exists, and the proposed class, in the aggregate, exceeds 100 members.

7. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being served on Plaintiff and a copy is being filed with the Clerk of the Eight Judicial District Court, Clark County, Nevada.

II. THIS COURT HAS SUBJECT MATTER JURISDICTION

8. The Class Action Fairness Act of 2005 ("CAFA") extends federal jurisdiction over any class action in which (1) minimal diversity exists, (2) the number of putative class members exceeds 100, and (3) the amount in controversy, in the aggregate, exceeds $5,000,000. 28 U.S.C. § 1332(d).

A. Minimal Diversity of Citizenship Exists.

9. In this case, minimal diversity of citizenship exists between Plaintiff and the Defendants. Pursuant to CAFA, diversity in a class action is established when "any member of a class of plaintiffs is a citizen of a State different from *any defendant*." 28 U.S.C. § 1332(d)(2)(A) (emphasis added). Furthermore, pursuant to 28 U.S.C. § 1453(b) "[a] class action may be removed to a district court of the United States in accordance with section 1446 . . . without regard to whether any defendant is a citizen of the State in which the action is brought." See 28 U.S.C. § 1453(b).

a. For purposes of diversity, a person is considered to be a citizen of the state in which he or she is domiciled. See Lew v. Moss, 797 F.2d 747, 749 (9^{th} Cir. 1986). In her Complaint, Plaintiff alleges that she is a resident of Nevada. (Compl. ¶ 13.) Plaintiff does not allege any alternative state of residence. Accordingly, upon information and belief, Nevada is the state in which Plaintiff is domiciled and, therefore, the state of which she is a citizen.[1]

[1] According to public records, Plaintiff resides at and has a car registered at 1120 Cathredral Ridge St., Henderson, Nevada.

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b. WAL-MART is, and was at the time Plaintiff commenced this action, a Delaware corporation with its principal place of business in Arkansas. Pursuant to 28 U.S.C. § 1332(c)(l), "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U.S.C. § 1332(c)(1). WAL-MART is thus deemed to be a citizen of Delaware and Arkansas, and not the State of Nevada.

c. Upon information and belief, Defendant MENU FOODS is, and was at the time Plaintiff commenced this action, a New Jersey corporation with its principal executive offices located in New Jersey. Accordingly, MENU FOODS is deemed to be a citizen of New Jersey, and not the State of Nevada.

d. Upon information and belief, Defendant DEL MONTE FOODS COMPANY is, and was at the time Plaintiff commenced this action, a Delaware corporation with its principal place of business located in California. Accordingly, DEL MONTE FOODS COMPANY is deemed to be a citizen of Delaware and California, and not the State of Nevada.

e. Upon information and belief, Defendant SUNSHINE MILLS, INC. is, and was at the time Plaintiff commenced this action, a Delaware corporation with its principal place of business located in Alabama. Accordingly, SUNSHINE MILLS, INC. is deemed to be a citizen of Delaware and Alabama, and not the State of Nevada.

f. Upon information and belief, Defendant CHEMNUTRA INC. is, and was at the time Plaintiff commenced this action, a Nevada corporation with its principal place of business located in Nevada.

g. The "DOE" Defendants are wholly fictitious and sham parties against whom no relief is, or could be, sought in this action. Pursuant to 28 U.S.C. § 1441(a),

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this Court should disregard the citizenship of any defendant sued under this fictitious name. See 28 U.S.C. § 1441(a) (citizenship of defendants sued under fictitious names are properly ignored for purposes of removal).

10. Pursuant to 28 U.S.C. § 1453(b) "[a] class action may be removed to a district court of the United States in accordance with section 1446 . . . without the consent of all defendants." See 28 U.S.C. § 1453 (b). Accordingly, it is not necessary that any of the other defendants, which upon information and belief have not yet been served in this action, consents or joins in this Notice.

B. The Putative Class Exceeds 100 Members.

11. The putative class in this action consists of "millions of Class Members." (Compl. ¶22 a.) Accordingly, the numerosity requirement of CAFA is satisfied. 28 U.S.C. § 1332 (d)(5)(B).

C. The Amount in Controversy Requirement Exceeds $5,000,000.

12. Plaintiff filed this putative class action on behalf of all other similarly situated individuals in the United States who purchased at least 16 different "Ol' Roy" brand pet food products manufactured, distributed, and sold by Defendants throughout the State of Nevada and the rest of the country. (Compl. ¶ 1.)

13. Plaintiff seeks recovery under the Nevada Deceptive Trade Practices Act ("NDTPA"), NRS §§ 41.600, 598.0915, for the alleged "fraudulent misrepresentation, concealment, suppression and omission of such material facts, all in violation of the applicable Consumer Fraud and Deceptive Business Practices Act." (Compl. ¶ 31.) Plaintiff also asserts a fraud claim and alleges that the "'Made in USA' designation was used on each package to give the appearance that the product was made in the USA, by United States workers and farmers, and under the protection of United States laws, when in fact, the Defendants knew or should have

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known that Ol' Roy brand pet food products were comprised of component(s) that were made and/or manufactured outside of the United States." (Compl. ¶ 39 d.) Lastly, Plaintiff asserts a cause of action against Defendants for unjust enrichment, claiming that "Defendants sold the Ol' Roy brand pet food products with the false designation that the Ol' Roy brand pet food products were 'Made in USA' and thereby unjustly reaped benefits and profits from consumers and the Class as a result of these representations." (Id. ¶ 46.) Furthermore, Plaintiff seeks "disgorgement" (Compl. ¶ 23) and her prayer for relief seeks damages and/or restitution in an amount to be determined at trial, injunctive relief, costs and disbursements, including attorneys' fees.

14. Plaintiff makes no specific allegation regarding the amount in controversy. "When a complaint does not specify the amount of damages sought, the removing defendant must prove by a preponderance of the evidence that the amount in controversy requirement has been met." Lowdermilk v. United States Bank National Association, 479 F.3d 994, 998 (9th Cir. 2007) quoting Abrego v. The Dow Chemical Co., 443 F.3d 676 (9th Cir. 2006). In this case, Plaintiff's allegations confirm that the amount in controversy exceeds $5,000,000. Plaintiff purports to represent millions of consumers "throughout the United States" (Compl. ¶ 22 a.) with respect to their purchases of "millions of units of Ol' Roy brand pet food products." (Compl. ¶ 28). Plaintiff further alleges that at least 16 different Ol' Roy, and possibly more, pet food products are at issue. (Compl. ¶ 1). The alleged time period at issue is "prior to March 16, 2007" and likely spans months or years. (Compl. ¶ 28.) This action thus seeks damages and disgorgement on behalf of millions of consumers in all 50 states who collectively purchased "millions" of units of at least 16 different types of Ol' Roy products during an unspecified time period likely spanning years. Accordingly, it is clear that the amount in controversy exceeds $5,000,000, exclusive of costs and interest.

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CONCLUSION

15. This case should be removed to the United States District Court for the District of Nevada pursuant to 28 U.S.C. §§ 1332 and 1441 because (1) Plaintiff is a citizen of the State of Nevada; (2) WAL-MART is not a citizen of the State of Nevada; (3) the proposed class exceeds 100 class members; and (4) the amount in controversy exceeds $5,000,000, exclusive of costs and interest.

DATED this 25 day of May, 2007.

SANTORO, DRIGGS, WALCH, KEARNEY, JOHNSON & THOMPSON

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BRIAN W. BOSCHEE, ESQ.
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400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101

Attorneys for Defendant Wal-Mart Stores, Inc.

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Exhibit A

10:30
5-8-07

DISTRICT COURT
CLARK COUNTY, NEVADA

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

MARGARET PICUS, an individual; on behalf of herself, and on behalf of all others similarly situated,

Plaintiffs,

vs.

WAL-MART STORES, INC.; MENU FOODS INC.;DEL MONTE FOODS COMPANY; SUNSHINE MILLS, INC.; CHEMNUTRA INC.; and DOES 1 through 100, Inclusive,

Defendants.

CASE NO: A 540315
DEPT NO: XXIII

SUMMONS

TO: **WAL-MART STORES, INC.**
702 SW 8th Street
Bentonville, AR 72716

c/o Resident Agent
Corporation Trust Company of Nevada
6100 Neil Road, Suite 500
Reno, NV 89511

NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO THE DEFENDANTS: A Civil Complaint has been filed by the Plaintiff against you for the relief set forth in the Complaint.

1. If you intend to defend this lawsuit, within 20 days after this Summons is served on you exclusive of the day of service, you must do the following:

   a. File with the Clerk of the Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court.

   b. Serve a copy of your response upon the attorney whose name and address is shown below.

b. Serve a copy of your response upon the attorney whose name and address is shown below.

2. Unless you respond, your default will be entered upon application of the plaintiff and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members and legislators, each have 45 days after service of this Summons within which to file an answer or other responsive pleading to the Complaint.

Issued at the direction of:

Robert B. Gerard, Esq.
Nevada State Bar #005323
Lawrence T. Osuch, Esq.
Nevada State Bar #006771
Jeremiah Pendleton, Esq.
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Las Vegas, Nevada 89146
Attorney for Plaintiffs

SHIRLEY B. PARRAGUIRRE, CLERK OF COURT

JULIE RICHMOND APR 30 2007

DEPUTY CLERK Date:
Regional Justice Center
200 Lewis Street
Las Vegas, Nevada 89155

DISTRICT COURT SEAL

STATE OF NEVADA)
) **ss.**
COUNTY OF CLARK)

AFFIDAVIT OF SERVICE

I, ________________________, being duly sworn says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, not a party to or interested in the proceeding in which this affidavit is made. That affiant received ______ copy(ies) of the Summons and First Consolidated Complaint on the _________ day of _________________, 2007 and served the same on the_______________ day of ______________, 2007 by:

(affiant must complete the appropriate paragraph)

1. delivering and leaving a copy with the defendant ____________________________________ at (state address) ____

2. serving the defendant________________________by personally delivering and leaving a copy with __________________________________, a person of suitable age and discretion residing at the defendant's usual place of abode located at:________________________________ .

(use paragraph 3 for service upon agent, completing A or B)

3. serving the defendant _____________________ by personally delivering and leaving a copy at the defendant's last known address which is:

   a. with ________________________ as_________________________, as agent lawfully designated by statute to accept service of process;

   b. with ______________________________, pursuant to NRS 14.020 as a person of suitable age and discretion at the above address, which address is the address of the resident agent as shown on the current certificate of designation filed with the Secretary of State.

4. personally depositing a copy in a mail box of the United States Post Office, enclosed in a sealed envelope postage prepaid (check appropriate method:

__________ ordinary mail
__________ certified mail, return receipt requested
__________ registered mail, return receipt requested

addressed to the defendant.

____
Signature of person making service

SUBSCRIBED AND SWORN to before
me this _____ day of __________, 2007.

____
NOTARY PUBLIC in and for said
County and State

My commission expires:______________
(SEAL)

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FILED

APR 30 11 21 AM '07

CLERK OF THE COURT

COM

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MARGARET PICUS, an individual; on behalf of herself, and on behalf of all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC; MENU FOODS INC.; DEL MONTE FOODS COMPANY; SUNSHINE MILLS, INC.; CHEMNUTRA INC.; and DOES 1 through 100, Inclusive, Defendants.	CASE NO.: A 540315 **COMPLAINT** XXIII **(JURY DEMAND)** **ARBITRATION EXEMPTION (CLASS ACTION)**

CLASS ACTION COMPLAINT

COMES NOW, Plaintiff MARGARET PICUS ("Plaintiff"), individually and on behalf of all others similarly situated, brings this action as a class action against Defendants WAL-MART STORES, INC; MENU FOODS INC.; DEL MONTE FOODS COMPANY; SUNSHINE MILLS, INC.; CHEMNUTRA INC., and DOES 1 through 100, inclusive (hereinafter collectively referred to as "Defendants"), for violations of applicable consumer fraud statutes, for unjust enrichment, and for fraud by omission and concealment. Plaintiff alleges, based upon information and belief, except where otherwise stated, as follows:

NATURE OF THE ACTION

1. The instant Class Action Complaint involves a scheme among the Defendants through which Ol' Roy brand pet food products were expressly sold to consumers as "Made in USA," when in fact components of the Ol' Roy brand pet food products were made and/or manufactured in China. Plaintiffs seek restitution and/or damages for all consumers throughout the United States who purchased "Ol' Roy" brand pet food products which represent on the product label to have been "Made in USA" during the applicable Class Period. The Ol' Roy brand pet food products which are the subject of this suit are the following specific products:

a. Pouch with Beef
b. Pouch with Chicken
c. Pouch with Filet Mignon
d. Pouch with Chicken Teriyaki
e. Pouch with Beef/Noodle/Vegetable
f. Pouch with Lamb/Rice/Gravy
g. Pouch with Stew
h. Pouch with Turkey
I. Can SI Beef
j. Can SI Chicken
k. Ol' Roy Beef Flavor Jerky Strips Dog Treats
l. Ol' Roy County Stew Hearty Cuts in Gravy Dog Food
m. Ol' Roy with Beef Hearty Cuts in Gravy Dog Food
n. Ol' Roy with Beef Hearty Strips in Gravy Dog Food
o. 4-Flavor Large Biscuits
p. Peanut Butter Biscuits

In addition, there may be other Ol' Roy brand pet food products that were similarly labeled as "Made in USA" but contained components that were imported from outside of the United States.

Plaintiff will therefore amend to list any additional Ol' Roy brand pet food products which were sold as "Made in USA" but contained components that were imported from outside the United States as such additional Ol' Roy brand pet food products are identified through discovery.

2. Central to the Defendants' marketing of certain of their products is the representation and designation that such products were and are "Made in USA." Defendants package these products with the designation on the label or packaging, in capital and bold lettering, that the products were "MADE IN USA." Studies show that the "MADE IN USA" is a substantial factor in consumer purchasing decisions. Moreover, in the context of food products, the designation that the products were "Made in USA" becomes a central and primary concern because of concerns about the health and safety of the pet and the differences in health and safety procedures in foreign countries.

3. At all relevant times, Defendant Wal-Mart Stores, Inc. operated a nationwide chain of retail stores selling a wide variety of consumer goods including pet food products under the brand name "Ol' Roy" after the famous Wal-Mart founder Sam Walton's bird dog, Ol' Roy. Defendant Wal-Mart Stores, Inc. operated these retail stores in Nevada and sold pet food products under the brand name "Ol' Roy" to consumers in Nevada and throughout the United States

4. All of the pet food products under the brand name "Ol' Roy" sold to consumers in Nevada and nationwide have substantially the same product label. On each package of Ol' Roy pet food, the label uniformly represents that the product was "MADE IN USA" in capital letters. A true and correct exemplar copy of an Ol' Roy pet food label attached hereto as Exhibit #1, evidencing the uniform representations regarding geographic origin of the product. All of the Ol' Roy pet food sold by Wal-Mart Stores, Inc. contains identical or substantively similar representations as to the geographic origin of the product being "Made in USA."

5. At all relevant times, Ol' Roy brand pet foods were not "Made in USA" as falsely advertised, but instead, were manufactured either in whole or in part, in China. On or after March 16, 2007, as a result of the FDA investigation into these products, Defendants disclosed for the first time that the Ol' Roy brand pet food products contained ingredients manufactured in

China.

6. At all relevant times, Defendants WAL-MART STORES, INC. ("Wal-Mart") MENU FOODS INC. ("Menu"), DEL MONTE FOODS COMPANY ("Del Monte"), and SUNSHINE MILLS, INC. ("Sunshine") were companies that each participated in the manufacture and/or distribution of an Ol' Roy brand pet food product and were responsible in some part, for the misrepresentation that the Ol' Roy product was "Made in USA." Wal-Mart, Menu, Del Monte and Sunshine each participated in the packaging or labeling of different Ol' Roy brand pet food products, each with the fraudulent representation of geographic origin. Wal-Mart, Menu, Del Monte and Sunshine each knew or exercised conscious disregard for the truth that Ol' Roy brand pet food products were not "Made in USA," but instead, were manufactured either in whole or in part, in China. Despite this knowledge, they nevertheless participated with Wal-Mart in the fraudulent labeling of Ol' Roy pet food products as "Made in USA." Wal-Mart, Menu, Del Monte and Sunshine each knew that the fraudulent labeling of Ol' Roy brand pet food products as "Made in USA" would be reasonably relied upon by end consumers. Despite this knowledge, they nevertheless participated in fraudulent labeling of Ol' Roy brand pet food products, distributing Ol' Roy products to Wal-Mart for the intended purpose of sales to the consumers in Nevada and nationwide, without any reasonable grounds to believe that the products were "Made in USA."

7. At all relevant times, Defendant CHEMNUTRA INC. ("Chemnutra") is the company responsible, whole or in part, for importing the manufactured wheat gluten ingredient in Ol' Roy brand pet food products from China and supplying the same for use in the Ol' Roy brand pet food products. The Chinese product imported by CHEMNUTRA was actually used in the Ol' Roy brand pet food products. Although importing the manufactured wheat gluten ingredient from China, CHEMNUTRA nevertheless participated in the scheme and practice of labeling the Ol' Roy brand pet food products as "Made in USA" and/or were responsible for the mislabeling of the Ol' Roy brand pet food products as "Made in USA."

8. Under the federal regulations established by the Federal Trade Commission, for a product to be called "Made in USA," the product must be "all or virtually all" made in the U.S.

The term "United States," includes the 50 states, the District of Columbia, and the U.S. territories and possessions. Under this standard, "All or virtually all" means that "all significant parts and processing that go into the product must be of U.S. origin. That is, the product should contain no — or negligible — foreign content." *See* Federal Trade Commission Statement "Complying with the Made In the USA Standard."

9. The Ol' Roy brand pet food products that were imported, manufactured and sold by Defendants were comprised of components that were manufactured outside of the United States, including but not limited to China. At all relevant times prior to March 16, 2007, Defendants failed to disclose and concealed the fact that Ol' Roy brand pet food products contained ingredients or components that were manufactured and/or made in China and failed to exercise the necessary skill and care required to determine the accuracy of this statement.

10. Contrary to Defendants' packaging of Ol' Roy brand pet food products, (a) the Ol' Roy products contain certain components that have been entirely or substantially made, manufactured or produced outside of the United States, and (b) not all, or virtually all, of each Ol' Roy product is "Made in USA." Defendants have fraudulently concealed the material facts at issue herein by failing to disclose to the general public the true facts regarding the country of origin designation appearing on the Ol' Roy brand pet food products. The disclosure of this information was necessary in order to make the Defendants' representations regarding product origin not misleading. Defendants possess superior knowledge of the true facts, including knowledge that certain components were imported under a "Made in China" designation, which was not disclosed and which was necessary to discover the wrongful conduct, thereby tolling the running of any applicable statute of limitation.

11. Consumers and users of these products are particularly vulnerable to these deceptive and fraudulent practices. Defendants were in the exclusive possession of information regarding the country of origin for Ol' Roy brand pet food products. Most consumers possess very limited knowledge of the likelihood that products claimed to be "Made in USA" are in fact made, in whole or in part, in foreign countries. This is a material factor in many people's purchasing decisions, as they believe they are buying truly American products and supporting

American companies and American jobs. Consumers generally believe that "Made in USA" products are higher quality products than those of other countries. Unaware of the falsity of the Defendants' country-of-origin claims, Plaintiff and the other members of the Class were fraudulently induced to purchase Ol' Roy brand pet food products under false pretenses and at premium prices. State and federal laws are uniformly designed to protect consumers from this type of false advertising and predatory conduct. Defendants' deception of consumers is ongoing and will victimize consumers every day until it is altered by judicial intervention.

12. The country-of-origin designation is especially important and material in the context of food products because of the protections afforded by the Food and Drug Administration, and local health agencies, over food products made in the United States. For example, food products made in foreign countries can be grown or made using banned pesticides and/or chemicals, which one would not expect to find in Made in USA food products. Consumers who purchase food products designated with the "Made in USA" reasonably believe that they are purchasing product which has been grown and made in accordance with state and federal regulations. These same regulations are not present in foreign countries where unsafe and deleterious chemicals may be used without regulatory oversight. This concern is evidenced by the 2007 recall of many Ol' Roy brand pet food products, which was ordered because of the presence of chemicals which were illegal for use in food in the United States. This would not have occurred if the products were in fact "Made in USA" as represented.

THE PARTIES

13. The Plaintiff MARGARET PICUS is, and at all time mentioned herein was, a resident of Nevada, who purchased Ol' Roy brand pet food products at a Wal-Mart retail store located in Henderson, Nevada during the Class Period. The Plaintiff purchased Ol' Roy brand pet food products as a consumer for the household purpose of feeding the product to her beloved pet.

14. Defendant WAL-MART STORES, INC. is and at all times mentioned herein was,

a corporation organized under the laws of Delaware, authorized to conduct business in Nevada, and has a principal place of business in Arkansas. At all relevant times, Wal-Mart conducted and conducts substantial business in the State of Nevada and substantially availed and avails itself of the consumer pet food market in Nevada and the United States.

15. Defendant MENU FOODS INC. is and at all times mentioned herein was, a corporation organized under the laws of New Jersey with a principal place of business in Ontario, Canada. At all relevant times, Menu conducted and conducts substantial business in the State of Nevada and substantially availed and avails itself of the consumer pet food market in Nevada and the United States.

16. DEL MONTE FOODS COMPANY is and at all times mentioned herein was, a corporation organized under the laws of Delaware with a principal place of business in San Francisco, California. At all relevant times, Del Monte conducted and conducts substantial business in the State of Nevada and substantially availed and avails itself of the consumer pet food market in Nevada and the United States.

17. SUNSHINE MILLS, INC. is and at all times mentioned herein was, a corporation organized under the laws of Delaware with a principal place of business in Alabama. At all relevant times, Sunshine conducted and conducts substantial business in the State of Nevada and substantially availed and avails itself of the consumer pet food market in Nevada and the United States.

18. CHEMNUTRA INC. is and at all times mentioned herein was, a corporation residing in and with a principal place of business in Nevada. At all relevant times, Chemnutra conducted and conducts substantial business in the State of Nevada and substantially availed and avails itself of the consumer pet food market in Nevada and the United States.

19. Plaintiffs are ignorant of the true names and capacities of the Defendants sued herein as DOES 1 through 100, inclusive, and therefore sued these Defendants by fictitious names. Plaintiffs will amend further this Class Action Complaint to allege the true names and capacities of these Defendants if and when they are ascertained. Each of these Defendants, sued by the fictitious DOE designation, was in some manner responsible for the acts, omissions,

misrepresentations, non-disclosures, breach of warranties, fraud, unjust enrichment, deceptive business practices, violation of statutes, aiding and abetting the scheme, and other wrongdoing as alleged herein, all of which directly and proximately caused damage to Plaintiffs. Plaintiffs are further informed and believe that said Defendants, some of them, each of them and/or all or them were the knowing and willful participants in a scheme to promote, market, sell, advertise, or otherwise benefit from the sale of mislabeled Ol' Roy brand pet food products.

JURISDICTION AND VENUE

20. This Court has jurisdiction over this action, and venue is proper in Clark County, Nevada, because (1) the Plaintiff's purchases of Ol' Roy brand pet food products occurred in Clark County, (2) the Plaintiff resides in Clark County, (3) sale of Ol' Roy brand pet food products to members of the Class occurred in Clark County, (4) Chemnutra is located in Las Vegas, Nevada, and (5) the deceptive trade practices that give rise to this claim emanated from and occurred, in whole or in part, in Nevada.

CLASS ALLEGATIONS

21. Plaintiff brings this action pursuant to Rule 23 of the Nevada Rules of Civil Procedure as a nationwide class action on her own and on behalf of a class defined as:

> ALL INDIVIDUALS IN THE UNITED STATES WHO PURCHASED ONE OR MORE OL' ROY BRAND PET FOOD PRODUCTS PRIOR TO MARCH 16, 2007

The OL' ROY BRAND PET FOOD PRODUCTS which are the subject of this suit are the following specific products:

a. Pouch with Beef
b. Pouch with Chicken
c. Pouch with Filet Mignon
d. Pouch with Chicken Teriyaki
e. Pouch with Beef/Noodle/Vegetable
f. Pouch with Lamb/Rice/Gravy
g. Pouch with Stew
h. Pouch with Turkey
I. Can SI Beef
j. Can SI Chicken
k. Ol' Roy Beef Flavor Jerky Strips Dog Treats
l. Ol' Roy County Stew Hearty Cuts in Gravy Dog Food
m. Ol' Roy with Beef Hearty Cuts in Gravy Dog Food

n. Ol' Roy with Beef Hearty Strips in Gravy Dog Food
o. 4-Flavor Large Biscuits
p. Peanut Butter Biscuits

In addition, other Ol' Roy brand pet food products may also have been similarly labeled as "Made in USA" but contained components that were imported from outside of the United States. Plaintiff will therefore amend to list any additional Ol' Roy brand pet food products which were sold as "Made in USA" but contained components that were imported from outside the United States as such additional Ol' Roy brand pet food products are identified through discovery. Excluded from the Class are Defendants, any parent, subsidiary or affiliate of Defendants, and their officers, directors, and employees of Defendants, and any judicial officer who may preside over this cause of action.

22. The requirements for maintaining this action as a class action are satisfied in that:

a. It is impracticable to bring all members of the Class before the Court. Plaintiff estimates that there are thousands of Class Members geographically spread throughout Nevada and that there are millions of Class Members, geographically spread throughout the United States. Attempting to join and name each Class member as a Co-Plaintiff would be unreasonable and impracticable.

b. There are questions of law and fact common to the Class, which are identical for each member of the Class and which predominate over the questions affecting the individual Class members, if any. Among these common questions of law and fact are:

(I) Whether Defendants made deceptive representations or designations of geographic origin in connection with Ol' Roy brand pet food products;

(I) Whether the representations or designations of geographic origin in connection with Ol' Roy brand pet food products violated 15 U.S.C. §45a;

(ii) Whether Ol' Roy brand pet food products were represented on the package labeling to have been "MADE IN USA";

(iii) Whether all, or virtually all, of the Ol' Roy brand pet food products were "Made in USA"; ;

(Iv) Whether Defendants were unjustly enriched through the distribution and/or sale of Ol' Roy brand pet food products as "Made in USA";

(v) Whether Defendants concealed the true origin of Ol' Roy brand pet food products and omitted the fact that Ol' Roy brand pet food products contained components that were manufactured and made, in whole or in part, outside the United States;

(vi) Whether Defendants participated in the alleged mislabeling of Ol' Roy brand pet food products as "Made in USA";

(vii) Whether Defendants knew or should have known that Ol' Roy brand pet food products contained components that were manufactured and made, in whole or in part, outside the United States;

(viii) Whether the members of the Class sustained damage as a result of the Defendants' conduct;

(ix) Whether the Defendants unfairly or unlawfully received and/or retained revenue acquired through the scheme alleged herein;

(x) Whether the Defendants engaged in a uniform corporate policy of marketing Ol' Roy brand pet food products as "Made in USA";

(xi) Whether the applicable statute of limitations was tolled by virtue of Defendant's concealment and fraud;

(xii) Whether the Defendants committed fraud in the marketing, distribution and/or sale of Ol' Roy brand pet food products and whether Defendants participated in such fraud.

c. The claims of the representative Plaintiff are typical of the claims of the

Class in that the Plaintiff purchased Ol' Roy brand pet food products prior to March 16, 2007. The claims of both the named Plaintiff and the claims of all other Class members result from Defendants' actions in marketing and/or labeling Ol' Roy brand pet food products as "Made in USA" which were in fact made, manufactured or produced with certain components made outside of the United States.

d. The claims of the representative Plaintiff will fairly and adequately protect the interests of the Class. The Class interests are coincident with, and not antagonistic to, those of the Plaintiff. Furthermore, Plaintiff has retained and is represented by experienced class action counsel.

23. In this action, Plaintiff and the Class seek all relief authorized under Nevada law for which class-wide relief is available, disgorgement, restitution and reasonable attorneys' fees and costs incurred in the prosecution of this action. There are no manageability problems due to variations in state laws or choice of law provisions, because the representations of "Made in USA" were uniform and systematic and the laws of the United States and of all 50 states prohibit and make unlawful the designation of "Made in USA" on a product that is not made in the U.S.A. Further, the deceptive or false designation of geographic origin is actionable in all 50 states, and there are no relevant variations in the law of the states which impact the claims asserted herein. The performance of applicable choice of law or conflict of law analysis does not render the class unmanageable, moreover, any manageability issue which may arise can be handled through the use of a subclass.

24. A class action is superior to any other available methods for the fair and efficient adjudication of this controversy. The amount of each individual claim is too small to warrant individual litigation. Even if any group of class members itself could afford individual litigation, such a multitude of individual litigation would be unduly burdensome to the courts in which the individual litigation would proceed. The class action device is preferable to individual litigation because it provides the benefits of unitary adjudication, economies of scale, and comprehensive adjudication by a single court. Finally, class wide litigation will insure that wrong doers do not retain the ill-gotten gains acquired through their wrongful conduct.

25. A certified Class for injunctive relief is appropriate because Defendants have uniformly acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the Class as a whole. Conjunctively, or alternatively, a class certified for restitution and/or damages is also appropriate. The common questions of law and fact predominate over individual questions because all injuries sustained by any member of the Class arise out of the singular conduct of the defendant in uniformly providing deceptive representations regarding the Ol' Roy brand pet food products and selling such products to the Class through deceptive and unlawful representations regarding the geographic origin of the products.

COUNT I

VIOLATION OF THE NEVADA DECEPTIVE TRADE PRACTICES ACT AND SIMILAR STATUTES IN OTHER STATES (Against All Defendants)

26. Plaintiff repeats, incorporates by reference and realleges the allegations contained in Paragraphs 1-25 above as if fully set forth herein.

27. Plaintiff brings this claim under Nevada consumer fraud laws, particularly NRS Sections 41.600 and 598.0915, on behalf of herself and the Class who purchased Ol' Roy brand pet food products and who were thus uniformly subject to Defendants' above-described deceptive, unlawful and fraudulent conduct. The laws of every other state are identical to and/or substantively similar to Nevada consumer fraud laws in that federal law and the laws of every state prohibit the use of deceptive representations regarding the geographic origin of products, and every state similarly authorizes an action by consumers for such conduct. In addition, the laws of the state of Delaware, and in particular 6 Del. C. § 2532(a)(4) is identical to that of Nevada N.R.S. §598.0915.

28. The Ol' Roy brand pet food products, as described above, were purchased by the Plaintiff and by other consumers similarly situated primarily for personal, family, or household purposes. Millions of units of Ol' Roy brand pet food products were sold in the United States prior to March 16, 2007.

29. The Defendants violated their statutory duty by working in concert and each participating in an elaborate scheme wherein Defendants deliberately mislabeled products or caused products to be mislabeled as to their geographic origin for the purpose of deceiving consumers, increasing sales and reducing costs. Defendants also acted deceptively and unfairly because all of the Ol' Roy brand pet food products had the deceptive appearance of a product that was made in the USA.

30. The Defendants violated their duty under the aforementioned statutes, including but not limited to, N.R.S § 598.0915 (4), by, among other things, making false representations and/or designations as to the geographic origin of the Ol' Roy brand pet food products. This conduct violates Nevada law, and the law of every other state, including but not limited to California (Cal. Civil Code §1770(a)(4)), Arkansas (Ark. Stat. Ann. §4-88-107(a)(1)), Alabama (Code of Ala. §8-19-5(4)), and Delaware (6 Del. C. §2532), all of which laws are identical in prohibiting deceptive representations or designations of geographic origin in the marketing and sales of goods.

31. The Defendants' actions as alleged herein were unfair and deceptive and constituted fraud, misrepresentation and the concealment, suppression and omission of material facts with the intent that Plaintiff and the Class would rely upon the fraudulent misrepresentation, concealment, suppression and omission of such material facts, all in violation of the applicable Consumer Fraud and Deceptive Business Practices Acts.

32. Each Ol' Roy brand pet food product represented to the Plaintiff and every other member of the Class, at the time of purchase, that the Ol' Roy brand pet food product was "MADE IN USA" without qualification. Contrary to such representation, each Ol' Roy brand pet food product purchased by the Plaintiff and by every other member of the Class uniformly contained component(s) that were made and/or manufactured outside of the United States.

33. These representations were made by Defendants to Plaintiff and the Class in writing on the label of each Ol' Roy brand pet food product purchased by the Plaintiff and by every other member of the Class, at the time of their respective purchases. Because the true facts concerning the use component(s) that were made and/or manufactured outside of the United

States were concealed by Defendants and never disclosed until after March 16, 2007, the true facts concerning the geographic origin of the products were not and could not have been known to Plaintiff or any other member of the Class.

34. When making the representations on the label that the products were "Made in USA", the Defendants intended that the representations be relied upon by all consumers in making their purchase.

35. All other states have consumer fraud statutes which are substantially similar to the Nevada Consumer Fraud Act. To the extent that the Nevada Consumer Fraud Act my be found not to protect the residents of other states, the consumer fraud acts of the Defendants' forum state could be applied to all members of the Class.

36. Plaintiff was injured by the many violations of the Nevada Consumer Fraud Act, and parallel sister state statutes, and Plaintiff has thereby been damaged in an amount to be proven at trial. As a direct and proximate result of the acts and practices alleged above, members of the general public who purchased the subject Ol' Roy brand pet food products from Defendants, including the Plaintiff, lost monies in a sum currently unknown but subject to proof at the time of trial. This Court is empowered to, and should, order restitution to all persons from whom Defendants deceptively, unfairly and/or unlawfully took money in order to accomplish complete justice.

COUNT II

FRAUD-INTENTIONAL NON-DISCLOSURE OF MATERIAL FACTS

(Against All Defendants)

37. Plaintiff repeats, incorporates by reference and realleges the allegations contained in Paragraphs 1-36, above as if fully set forth herein.

38. The Defendants, working in concert under the above-described elaborate, fraudulent scheme, intentionally concealed and failed to disclose material facts about Ol' Roy brand pet food products and the true facts that should have been made known to the public and the Plaintiff Class prior to their purchase of Ol' Roy brand pet food product. In particular, the Defendants failed to

disclose the material facts alleged herein above with regard to the true geographic origin of important and substantial component(s) of Ol' Roy brand pet food products. By way of further information, Plaintiff further allege as follows:

Defendants:

39. The Defendants participation in the fraudulent scheme is set forth as follows:

a. Who: The Defendants each participated in the labeling of Ol' Roy brand pet food products as "Made in the USA" when they each knew that the Ol' Roy brand pet food products were not made in USA and contained important and substantial component(s) that were made and/or manufactured outside of the United States.

b. When: The Ol' Roy brand pet food products deceptively represented their geographic origin as herein alleged at all times prior to March 16, 2007, when the true origin of these products were disclosed for the first time as a result of an investigation by the Food and Drug Administration.

c. Where: On the label and/or packaging of the Ol' Roy brand pet food products sold in Nevada and throughout the United States.

d. Nature of Fraud: This was a fraud as to the geographic origin where "Made in USA" designation was used on each package to give the appearance that the product was made in the USA, by United States workers and farmers, and under the protection of United States laws, when in fact, the Defendants knew or should have known the Ol' Roy brand pet food products were comprised of component(s) that were made and/or manufactured outside of the United States. In fact, Chemnutra admitted in its recall notices that the component(s) of Ol' Roy brand pet food products were originally labeled as "Made in China", which designation apparently was changed and/or altered by Defendants before sale to consumers.

e. How and When Were Material Facts Concealed From The Plaintiffs: Defendants failed to disclose and concealed the true geographic origin of component(s) of the Ol' Roy brand pet food products.

40. These non-disclosures of material fact were made intentionally in order to deceive the Plaintiff and the other Class members, to induce their reliance, and in order to enrich the

Defendants by using sub-standard foreign components and passing such components off to the public as "MADE IN USA." Said non-disclosures were made for the purpose of facilitating and/or aiding and abetting the scheme to market and sell these products to the public using deceptive representations of geographic origin.

41. If Plaintiff and the other members of the Class had known of the facts which Defendants and each of them failed to disclose, they would never have purchased the Ol' Roy brand pet food products as they did.

42. Defendants' non-disclosures of material facts have caused damage to Plaintiff and the other members of the Class.

COUNT III

Unjust Enrichment

(Against All Defendants)

43. Plaintiff repeats, incorporates by reference and realleges the allegations contained in Paragraphs 1-42 above as if fully set forth herein.

44. By labeling products as "Made in USA", Defendants represented that the subject "Made in USA" products have the characteristic of being made in America and the benefits of American-made products, which they do not have. Defendants have represented that the subject "Made in USA" products have the status of American-made products and the affiliation and connection with America, which they do not have. Moreover, Defendants have represented that the subject "Made in USA" products have the standard, quality, and grade of American-made products, which is not true. This "Made in USA" designation is a material and substantial factor in consumers' purchasing decisions, because consumers believe they are buying truly American products and supporting American companies and American jobs. Consumers generally believe that "Made in USA" products are higher quality products than those of other countries. Further, this "Made in USA" designation is especially important with respect to food products, because only through the Made in the USA designation can consumers insure that the products were not produced using illegal or banned chemicals or pesticides. This concern is evidenced by the recall of Ol' Roy

brand pet food products which was ordered because the products were found to contain substances which are not approved for use in food products in the United States, and the reason they contained such deleterious chemicals is because component(s) of the subject products were not made and/or manufactured in the United States, but instead were imported from countries with no such health protections.

45. In reality, the Ol' Roy brand pet food products were not made of all or substantially all American-made products. In particular, component(s) of the products were imported from outside the United States, including but not limited to wheat gluten imported from China. In the example of the wheat gluten from China, such components were imported as "Made in China" however, the Defendants changed and/or altered such designation to falsely state "Made in USA."

46. Defendants have benefitted and been enriched by the above-alleged conduct. Defendants sold the Ol' Roy brand pet food products with the false designation that the Ol' Roy brand pet food products were "Made in USA" and thereby unjustly reaped benefits and profits from consumers and the Class as a result of these representations. Defendants received and continues to receive sale benefits and profits at the expense of Plaintiff and the Class using such deceptive representation and designations.

47. Defendants used the aforementioned representations to induce Plaintiff and the other members of the Class to purchase the Ol' Roy brand pet food products. Accordingly, Defendants received benefits which they have unjustly retained at the expense of Plaintiff and the Class members. Defendants have knowledge of this benefit, voluntarily accepted such benefit, and retained the benefit. Plaintiff, and other consumers similarly situated, did not receive the benefits of American-made products and the added health protection flowing from such products, for which they bargained and paid a premium price. As a direct and proximate result of this conduct, Plaintiff and the other members of the Class were deprived of the benefits and money they expended which were improperly retained by Defendants, and are therefore entitled to restitution in an amount equivalent to the value of the benefit.

48. As a direct and proximate result of the Defendants conduct and unjust enrichment,

Plaintiff and the Class Members have suffered injury and seek relief in an amount necessary to restore them to the positions they would be in had Defendants not been unjustly enriched.

REQUEST AND PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against Defendants as follows:

1. Certify this action as a class action;
2. Award damages and/or restitution in an amount to be proven at trial;
3. Order declaratory relief finding that Defendants have engaged in deceptive trade practices or practices in violation of federal and state law.
4. Order injunctive relief enjoining Defendants and their officers, directors, agents, distributors, servants, employees, attorneys, and all others in active concert or participation with Defendants, or any of them, jointly and severally, during the pendency of this action and permanently thereafter from falsely representing the origin of the products;
5. Award pre-judgment and post-judgment interest at the maximum rate allowed by law and costs of suit;
6. Award Plaintiff attorneys' fees and all litigation expenses as allowable by law. Alternatively, for all attorneys' fees and all litigation expenses to be awarded pursuant to the substantial benefit doctrine or other authority requiring Defendants to pay Plaintiff's attorneys' fees and litigation expenses. Alternatively, for attorneys' fees and other litigation expenses to be paid under the common fund doctrine or any other provision of law; and
7. Order such other and further relief as the Court may deem just and proper.

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DATED this the 30 day of April, 2007.

GERARD & OSUCH, LLP

By: ______________________

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DEMAND FOR JURY TRIAL

PLAINTIFFS demand jury trial on issues triable to a jury.

Dated: April 30, 2007
49.

GERARD & OSUCH, LLP

By: ______________________

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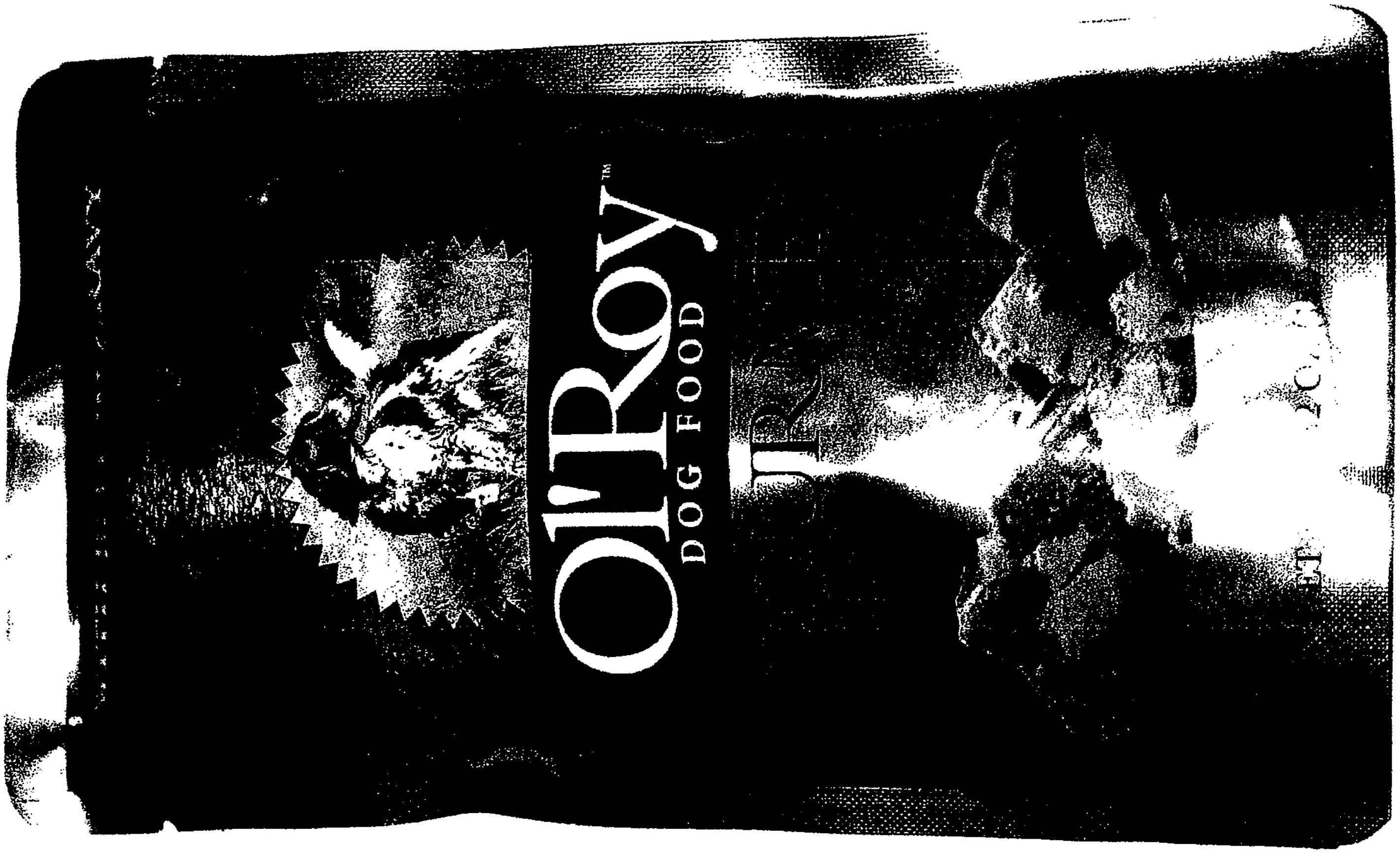
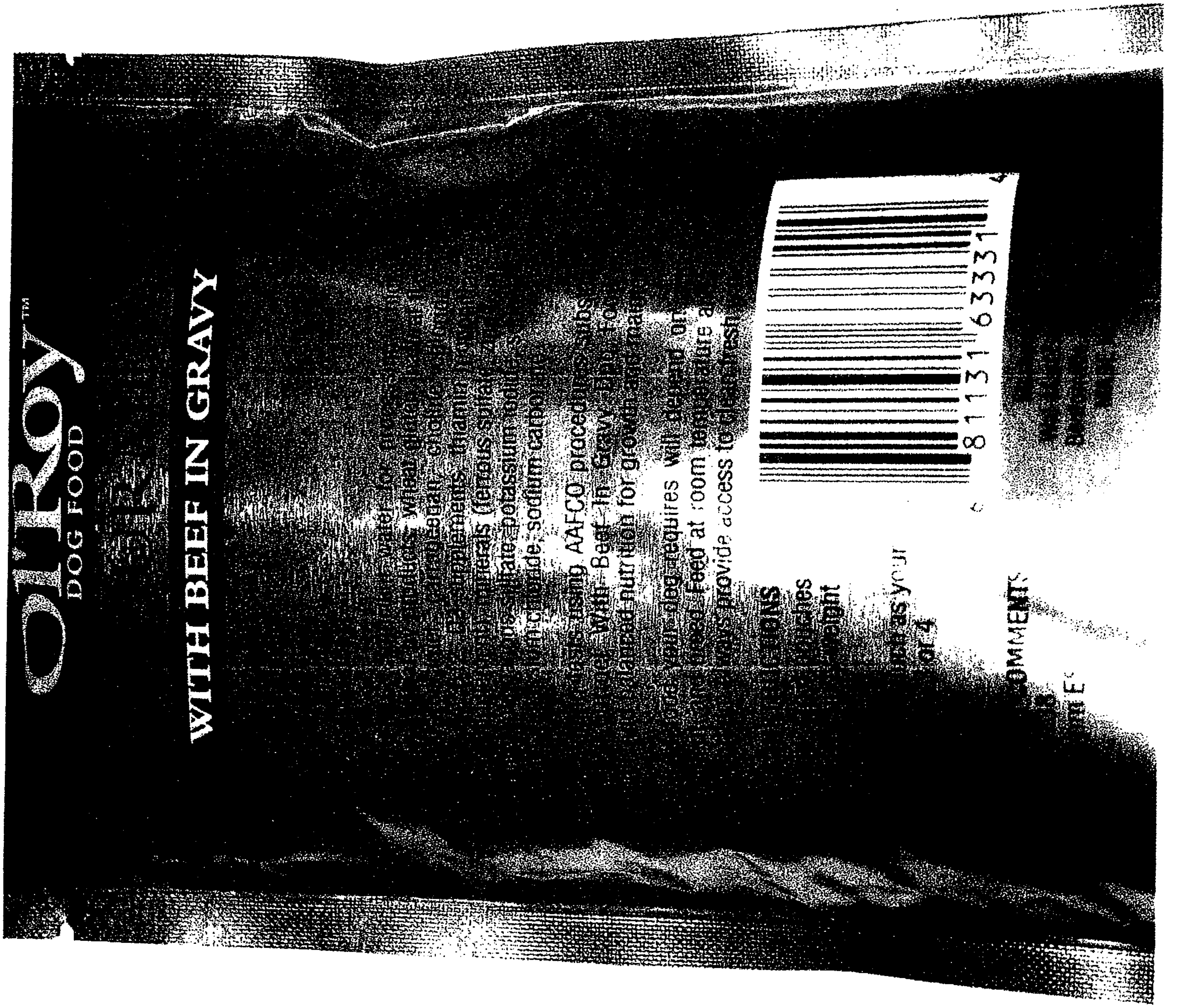
EXHIBIT #1


Ol'Roy™
DOG FOOD


DOG FOOD
WITH BEEF IN GRAVY

Wal-Mart